Supreme Court, U.S.
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No. 02-592

IN THE SUPREME COURT OF THE UNITED STATES

SYED M. A. HASAN,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY

The Department of Labor ("DOL") and Wolf Creek Nuclear Operating Corp. ("Wolf Creek) have submitted briefs in opposition to Mr. Hasan's Petition for *Certiorari.*[*] In their papers, the respondents re-frame the questions presented and argue that Mr. Hasan was afforded discovery during the DOL proceeding below. Because the respondents' representations are incorrect and misleading, Mr. Hasan respectfully submits the following reply pursuant to Sup. Ct. R. 15.6.

I. MR. HASAN WAS NEVER AFFORDED PERTINENT DISCOVERY IN THE DOL ADMINISTRATIVE PROCEEDING BELOW.

One question presented in this case is whether, absent discovery, the Department of Labor may dismiss a claim brought under the Energy Reorganization Act ("ERA") for failure to allege a *prima facie* case of employment discrimination. *See* Petition for *Certiorari*, p. i.

While the respondents would have this Court believe the question presented is moot and that Mr. Hasan actually *was* afforded discovery, the reality is that Mr. Hasan *was never afforded* pertinent discovery below, and that failure has been an issue in this case all along.

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[*] Mr. Hasan objects to Wolf Creek's self-designation as "Respondent," since DOL is the sole proper respondent in this matter. Nevertheless, for the sake of brevity, Mr. Hasan refers to DOL and Wolf Creek as "the respondents" in this Reply.

First, this Court needs look no further than the plain language of the Tenth Circuit's decision. Therein, the court expressly noted that Hasan was not afforded discovery: "the ARB's decision to dismiss this action *prior to discovery* did not affect Mr. Hasan's ability to state a viable claim." *See* Appendix to Petition for *Certiorari* ("App."), p. A7.

Clearly, the Tenth Circuit heard and rejected the respondents' arguments, as it expressly found that even though Hasan did not receive discovery, his claim could be dismissed for failure to state a *prima facie* case of employment discrimination.[1]

The administrative record fully supports the Tenth Circuit's findings on this point, and the respondents arguments to the contrary are at best misleading and, at worst, patently false. For example, while Wolf Creek tells this Court that it provided Hasan with "comprehensive responses to his discovery requests," and that "Hasan did not challenge the sufficiency of (Wolf Creek's) discovery responses by filing a motion to compel with the ALJ," Brief of Wolf Creek, p. 3, the record shows this statement to be untrue.

Hasan filed his request for an ALJ hearing on

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1 Respondents argue that Hasan raised the discovery issue for the first time on a petition for rehearing. That statement is not true. The Tenth Circuit also expressly noted in its opinion that Hasan "contends he was denied discovery." *See* App., p. A4.

February 28, 2000. *See* App., p. A19.[2] Within two weeks, Wolf Creek filed a motion to dismiss Hasan's complaint and a motion for "protective order seeking to preclude discovery until the ALJ ruled on the pending motion to dismiss." *See* Brief of Wolf Creek, p. 2.

The ALJ denied Wolf Creek's motion for protective order and, on April 3, 2000, ordered Wolf Creek to reply to Hasan's discovery requests. *Id.* However, Wolf Creek *never was required to fully answer Hasan's discovery.* Though Wolf Creek did proffer some discovery responses on April 25, 2000, it certainly did not "provide Hasan with comprehensive responses to his discovery requests," as it now claims. *See* Brief of Wolf Creek, p. 3.

Rather, Wolf Creek refused to give Hasan the names and number of civil / structural / pipe-support engineers that it hired at various locations since May 18, 1999. These names and the numbers of positions filled, along with the job advertisement information were precisely the information Mr. Hasan needed in order to allege a *prima facie* case.

The Tenth Circuit missed this point. That court held that Hasan "did not sufficiently allege that respondent took some adverse action against him because of his protected activity." App., p. A6. Specifically, the court held, "Mr.

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2 The ALJ hearing is a stage of *de novo* review, wherein any findings by OSHA, *e.g.*, findings dismissing Hasan's complaint, are "inoperative" for the duration of the ALJ review. *See, e.g.* 29 C.F.R. § 24.5(d); § 24.4(d)(2).

Hasan failed to allege that a position for which he was qualified was available and that respondent either filled that position or continued to search for applicants for that position after refusing to hire him." *Id.*

The problem with the Tenth Circuit's finding is that the names and information about all civil / structural / pipe-support engineers hired after May 18, 1999, would have revealed whether Wolf Creek filled the position with someone else or continued to search for applicants for the position after rejecting Hasan.

On April 20, 2000, the ALJ issued a show cause order, directing Hasan to submit evidence or offer arguments in support of his claim within thirty days of receipt of Wolf Creek's discovery responses. However, the ALJ *never* made Wolf Creek proffer *pertinent* discovery responses, such as the answers to Hasan's requests for information about engineers hired after May 18, 1999. Absent that information, neither Mr. Hasan nor any other victim of similar retaliatory failure to hire could possibly state a *prima facie* case.

On June 12, 2000, Mr. Hasan filed his response to the ALJ's show cause order. Hasan's response is listed at item number 14 of the DOL's Certified List, which comprises the administrative record in this matter. *See* Brief of Wolf Creek, p. 2, n. 1.

In his response, Mr. Hasan specifically argued that "the respondent is not providing me the entire discovery materials (under 29 C.F.R. Part 18). The respondent is not even providing me copies of all the internet advertisements

pertaining to the hiring of civil / structural / pipe support engineers...this court, for the sake of justice, should order the respondent to provide me all the discovery documents (without redactions) that I am entitled to for the above ERA case." *See* Certified List, No. 14, p. 2.

This pleading directly challenges the sufficiency of Wolf Creek's discovery responses, and Wolf Creek's contrary representation to this Court – at p. 3 of its brief – is misleading at best and, at worst, *patently false*. However, the ALJ never required Wolf Creek to give Mr. Hasan the information he requested and, on October 5, 2000, dismissed Hasan's ERA claim.

What has happened to Mr. Hasan should be a warning to this Court that the ERA could be rendered useless if the DOL and lower courts continue to dismiss ERA complaints without pertinent discovery. These tribunals either misunderstand or misapply the principles this Court recently articulated in *Swierkiewicz*, and the Court should grant *certiorari* to curb this practice in ERA cases, just as it has done in other employment discrimination cases. *See, e.g. Rucker v. Potter*, 123 S.Ct. 465 (2002)(remanding to Ninth Circuit for consideration in light of *Swierkiewicz*).

Respectfully submitted,

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